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No. 84-470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

vs.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY and
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a District Court can properly order a consolidation, under the Federal Arbitration Act, of two separate arbitrations between different parties in the absence of the consent of the parties, where each arbitration arises under separate charter parties providing for different rights and obligations.

PARTIES INVOLVED

All parties to the proceeding below are named in the caption of the case in this Court as styled herein. Trans-Pacific Shipping Co. has altered the caption presented by petitioner Weyerhaeuser Company to reflect its proper status as party respondent as successor in interest to nominal respondents, Western Seas Shipping Co. and Eastern Seas Shipping Co.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Trans-Pacific Shipping Co. (hereinafter "Trans-Pacific"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at ..... F.2d .....

STATEMENT

Trans-Pacific, owner of the M/V PACDUKE and M/V PACDUCHESS, supplements and corrects the statement of facts by Weyerhaeuser in its petition (p. 4-9) with the following undisputed facts relevant to this case. At the time Weyerhaeuser reached agreement with Karlander on the subcharters of the two vessels, Weyerhaeuser did not have Trans-Pacific's permission to enter into such subcharters. When Weyerhaeuser sought such permission, Trans-Pacific secured an addendum to each of its charter agreements with Weyerhaeuser which insulated Trans-Pacific from any increase in its obligations by reason of the subcharters.

In particular, Weyerhaeuser agreed to indemnify and hold "owners harmless from and against all losses, costs, risks or expenses of any nature whatsoever suffered by owners during such sublet, which would not have been otherwise incurred by owners had the vessels not been sublet to Karlander...." (Pet. A-3 to A-4). Although consenting to the sublet of the vessels to Karlander, Trans-Pacific expressly did not consent to, or approve of, the terms of the subcharter agreements. Weyerhaeuser agreed that the subcharters would neither increase owner's obligations nor diminish owner's rights under the head charters with Weyerhaeuser. (C.R. 32-33 and 58-59.) The subcharter agreements between Weyerhaeuser and Karlander do not contain any such indemnity or hold harmless provisions.

The District Court and the Court of Appeals, in reaching their respective decisions, each noted and partially relied upon the indemnity provisions which were unique to the Trans-Pacific charter arrangements with Weyerhaeuser.

Pet. A-3 to A-4 and A-11.) The District Court noted that to order a consolidated arbitration among the three parties would directly contravene the contractual agreement which protected Trans-Pacific from any increase in its obligations by reason of any subcharter to Karlander by Weyerhaeuser (Pet. A-11). The Court of Appeals cited the same contract provisions while noting that the parties to this case clearly did not intend or consent to consolidated arbitrations. (Pet. A-3 to A-4.)

Contrary to Weyerhaeuser's assertion in its petition, Weyerhaeuser was not a "mere conduit". Weyerhaeuser had a contractual relationship with Karlander which imposed certain obligations, and a separate, different contract with Trans-Pacific which imposed greater obligations on Weyerhaeuser. A novation did not occur when Weyerhaeuser entered into the subcharters with Karlander and then agreed to indemnify and hold Trans-Pacific harmless by contractual addendum.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I

THE ALLEGED CONFLICTING DECISIONS OF THE NINTH CIRCUIT AND THE SECOND CIRCUIT ARE DISTINGUISHABLE ON THEIR FACTS

The decision by the Court of Appeals below correctly observed that the rationale of the Second Circuit's decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), rested on implicit, if not express, consent of the parties to joint arbitration. (Pet. A-3.) In *Compania Espanola* all three parties (owner, charterer and char-

terer's guarantor) executed an addendum to the charter party pursuant to which the guarantor assumed all the rights and obligations of the charterer on the very same terms and conditions set forth in the charter party. The guarantor expressly agreed to perform the balance of the charter contract upon receipt of notice by the owner that the charterer was in default under the charter.

On those facts, the Second Circuit held that the arbitration agreement in the charter party was binding on the guarantor because it had consented to be bound by the terms of the contract. 527 F.2d at 973. The Second Circuit noted that such facts presented a "proper case" for consolidation. 527 F.2d at 975. Actually, the issue of consolidated arbitrations did not have to be decided by the trial court or appellate court in *Compania Espanola* since the facts merely presented a case of three parties signatory to one contract with each party having agreed to arbitration. There simply was no need to consolidate within the meaning of Rule 42(a) of the Federal Rules of Civil Procedure. *Compania Espanola* therefore is distinguishable from this case where there are two separate, independent and different contracts. Subsequent decisions by the Southern District of New York have blindly followed the dictum as to consolidation in *Compania Espanola.* (See cases cited in Pet. p. 14 in footnote 11.)

Contrasted with the facts in *Compania Espanola,* in this case, Trans-Pacific did not expressly or implicitly consent to arbitration with Karlander. This is not a case of three signatories to one contract, but rather a case of separate contracts with different obligations and responsibilities. Trans-Pacific expressly disavowed any relationship with

Karlander and obtained an express contractual commitment from Weyerhaeuser that Trans-Pacific would be held harmless from any cost, expense or liability arising from the subcharters to Karlander. The contractual expectation of Trans-Pacific was that it would be insulated by Weyerhaeuser from any involvement whatsoever with Karlander.

Contrary to the assertion by Weyerhaeuser, this is not a case where Weyerhaeuser was a "mere conduit" or "innocent middleman". (Pet. 6-7 and 19-21.) By subchartering the vessels to Karlander, Weyerhaeuser did not secure a novation of its contractual responsibilities to Trans-Pacific. Weyerhaeuser contractually assumed the risks of potential liability to Karlander with no right of indemnity from Trans-Pacific. By virtue of the separate indemnity and hold harmless provisions which Weyerhaeuser provided to Trans-Pacific (without any corresponding provisions in its subcharters with Karlander), Weyerhaeuser assumed duties owing to Trans-Pacific which were greater and materially different from the duties owed by Karlander to Weyerhaeuser. The Ninth Circuit correctly distinguished this case from the Second Circuit's decision in *Compania Espanola*.

Since arbitration is a creature of contract and rests on the consent of the parties, some basis in fact must exist for finding consent, either expressly or implicitly, of the parties to consolidation. A charter party is a maritime contract and is subject to interpretation under the requirements of contract law. Gilmore & Black, *The Law of Admiralty*, 195 (2d Ed. 1975). A court may not force a party to arbitrate when, under principles of contract law, it has not agreed to do so. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347,

1353, 4 L.Ed.2d 1409, 1417 (1960); *Mediterranean Enterprises Inc. v. Ssangyong,* 708 F.2d 1458, 1463 (9th Cir. 1983). Trans-Pacific has not agreed to arbitrate with Karlander.

By reason of the addendum to the head charters entered into by Trans-Pacific and Weyerhaeuser, this case is distinguishable on its facts from the Second Circuit's decision in *Compania Espanola.* No square conflict exists between the decisions of the Ninth Circuit and the Second Circuit.

II

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE QUESTION OF CONSOLIDATION

Trans-Pacific contends, as set forth in Section I, that the unique facts and confusing record in *Compania Espanola, supra,* do not allow that case to be read as holding that a District Court is authorized to consolidate two arbitrations arising under two separate contracts. However, if and to the extent that *Compania Espanola* is so interpreted, the Ninth Circuit in this case correctly decided not to follow that course. Under the Federal Arbitration Act the power and authority of a District Court is limited. The Act provides that a District Court may stay an action brought in a U.S. District Court on an issue referable to arbitration (9 U.S.C. § 3); order a party to proceed to arbitration (9 U.S.C. § 4); appoint an arbitrator upon application of a party (9 U.S.C. § 5); issue an order confirming an arbitration award (9 U.S.C. § 9); vacate an arbitration award under certain circumstances (9 U.S.C. § 10); and modify or correct an arbitration award (9 U.S.C. § 11). These are the only instances in which a U.S. District Court is empowered to act under the Federal Arbitration Act.

Rule 81(a)(3) of the Federal Rules of Civil Procedure authorizes the use of the Federal Rules only in the above-mentioned judicial proceedings under the Arbitration Act. The Federal Rules do not apply to the procedure of arbitration hearings. Wright & Miller, *Federal Practice and Procedure,* Vol. 4, § 1015 at p. 81. The Ninth Circuit correctly recognized this distinction and the limited role of the Federal Rules in judicial proceedings arising under the Federal Arbitration Act. (Pet. A-4 to A-5.)

III

THE QUESTIONS RAISED BY WEYERHAEUSER DO DO NOT MERIT REVIEW

A. The Decision Below Will Not Cause Confusion in the Maritime Industry Nor Disturb the Uniformity of the Federal Maritime Law

Trans-Pacific agrees with Weyerhaeuser that charter parties routinely include arbitration provisions as a means for resolving disputes between the parties to the charter. The decision of the Ninth Circuit in this case, however, will not destroy the effectiveness of arbitration as a means for resolving disputes. On the contrary, the decision of the Ninth Circuit will promote arbitration as a means for resolving disputes since it honors the contractual expectations of the parties. If the parties do not provide for or agree to consolidated arbitrations, consolidation ought not to be forced upon them in contravention of their contractual expectations. If and to the extent that owners, charterers and subcharterers desire consolidated arbitrations, such can be readily accomplished by so providing in their respective contracts. The Ninth Circuit's decision does not prohibit consolidation of arbitration. The parties are free to consent to consolidation by contract or stipulation.

The decision below honors the legitimate contractual expectations of the parties and will not disturb existing or future chartering practice in the maritime industry. Parties will be free to consent to consolidated arbitration or pursue separate arbitration pursuant to contract.

As noted by Weyerhaeuser (Pet. p. 17), "[t]he law of charters is . . . federal law, as to which uniformity is required." Gilmore & Black, *The Law of Admiralty,* 196 (2d Ed. 1975). What Weyerhaeuser ignores, however, is that a charter party is merely a contract and, thus, points of law arising thereunder are governed by the same rules and principles of ordinary contract law. Gilmore & Black, *The Law of Admiralty,* 195-6 (2d Ed. 1975). Owners and charterers are still free to contract or consent by stipulation to consolidated arbitration. The Ninth Circuit's decision does not alter or disturb the uniformity of the federal maritime law.

B. The Arbitration Process Will Not Be Discouraged by the Decision Below

The decision below will not deter owners and charterers from inserting valid and enforceable arbitration clauses in their charter parties. The arbitration procedure remains as an expedient and inexpensive means for maritime interests to resolve their disputes. If the parties wish, they may contractually provide for consolidated arbitration or consent to consolidation after disputes arise. There is no reason to believe, and no evidence to support, that proceeding by separate arbitrations in the absence of consent to consolidation will compel parties to decline arbitration in favor of litigation in the courts. The contention by Weyerhaeuser that separate arbitrations will be more expensive and time consuming than consolidated arbitrations misses

the point. Parties to a contract should not be forced to arbitrate their disputes in a manner or method inconsistent with their respective contractual rights.

CONCLUSION

The decision of the Ninth Circuit is distinguishable on its facts from the decision of the Second Circuit. The question of consolidation was correctly decided by the Ninth Circuit in this case. The decision honors the legitimate contractual rights and expectations of the parties. Neither the arbitration process nor the uniformity of the maritime law will be disturbed by the decision below.

For all these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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